

FILED BY CLERK

APR 15 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2010-0003-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ALEJANDRO MOLINA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-58428

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

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By Cedric Martin Hopkins

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Attorney for Petitioner

B R A M M E R, Judge.

¶1 In 1999, Alejandro Molina was convicted after a jury trial of first-degree felony murder and was sentenced to a natural-life prison term. We affirmed his

conviction and sentence on appeal. *State v. Molina*, No. 2 CA-CR 00-0127 (memorandum decision filed Aug. 28, 2001). In June 2002, Molina filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court summarily dismissed. *See* Ariz. R. Crim. P. 32.6(c). Molina did not seek review of that ruling, but now petitions this court for review of the trial court's summary dismissal of his second petition for post-conviction relief, filed in November 2009. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Molina asserts, as he did below, that the trial court's premeditation instruction and the prosecutor's closing argument regarding premeditation were both improper because they suggested premeditation could be found based solely on the passage of time. This claim could have been raised on appeal and therefore presumptively is precluded under Rule 32.2(a)(1). On review, however, Molina relies on *State v. Dann*, 205 Ariz. 557, 74 P.3d 231 (2003), decided approximately four years after his conviction. We assume, without deciding, that *Dann* constituted a significant change in the law and that Molina's claim is not precluded pursuant to Rule 32.2(b). *See* Ariz. R. Crim. P. 32.1(g) ("significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence" ground for post-conviction relief).

¶3 Simply because a decision constitutes a significant change in the law, however, does not necessarily permit a collateral attack on a conviction which, like Molina's, was final when the decision was issued. *See State v. Sepulveda*, 201 Ariz. 158, ¶ 6, 32 P.3d 1085, 1087 (App. 2001). A significant change in the law is retroactive only if it renders "certain conduct exempt from the legislature's power to define criminal acts" or if it is a "'watershed rule[] of criminal procedure' that 'implicate[s] the fundamental fairness of the trial.'" *Id.*, quoting *Teague v. Lane*, 489 U.S. 288, 311-12 (1989) (alteration in *Sepulveda*). Molina neither asserts *Dann* falls within either of these categories, nor does anything in *Dann* suggest it does. Indeed, in addressing the issues relevant here, our supreme court in *Dann* primarily relied on *State v. Thompson*, 204 Ariz. 471, 65 P.3d 420 (2003), in which the court strongly suggested its ruling would have no retroactive effect. *See Dann*, 205 Ariz. 557, ¶¶ 16-17, 74 P.3d at 239; *Thompson*, 204 Ariz. 471, ¶ 32, 65 P.3d 420, 428 (2003) (defining premeditation instruction to be used "in future cases").

¶4 In any event, any error here was harmless beyond a reasonable doubt. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict."). Molina was convicted unanimously of first-degree felony murder, not premeditated first-degree murder. *See* A.R.S. § 13-1105(A)(1), (2). Proof of premeditation, therefore, was not required to support the conviction, and any error in the premeditation instruction could not have prejudiced Molina. *See Dann*, 205 Ariz. 557,

n.4, ¶¶ 17, 76, 74 P.3d at 240 n.4, 239, 250 (affirming felony murder conviction despite improper premeditation argument by state).

¶5 For the reasons stated, although we grant review of Molina’s petition, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge